Office of Chief Counsel
Internal Revenue Service

memorandum

TL-N-4005-99
JForsberg

date: July 22, 1999

to: Chief, Examination Division, North Central District
Attn: Roger Eichten, Group Manager, Group 1216

from: District Counsel, North Central District, St. Paul

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subject: [redacted]
Statute of Limitations on FISC Refund

Our advice has been requested as to whether a refund can be issued to [redacted] for its TYE [redacted] based on a redetermination of the commission expense payable to [redacted], [redacted]'s FSC. For the reasons discussed below, we are of the opinion that issuance of the refund sought is precluded by Treas. Reg. 1.925(a)-1T(e)(4).

FACTS

[redacted] ("[redacted]"), a U.S. Virgin Islands corporation, is a wholly-owned subsidiary of [redacted] ("[redacted]"). [redacted] is a commission FSC. [redacted] and [redacted] have taxable years ending December 31. [redacted]'s Form 1120 for the TYE [redacted] was filed on [redacted]. [redacted]'s Form 1120-FSC for the TYE [redacted] was filed on or about [redacted].

A Form 872 (Consent to Extend the Time to Assess Tax) extending the statute of limitations on assessment for [redacted]'s TYE [redacted] to [redacted], was executed on behalf of the taxpayer and on behalf of the Commissioner on [redacted], and [redacted], respectively. The Form 872 was in the name of "[redacted]" and showed the EIN of [redacted] ([redacted]). The signature block on the Form 872 likewise showed the taxpayer as "[redacted]" and was signed by [redacted], Vice President - Tax & Public Affairs. [redacted] is also apparently an officer of [redacted]. [redacted] did not file a protective claim for refund for the TYE [redacted], nor was a separate Form 872 executed with respect to [redacted]'s TYE [redacted].

On [redacted], [redacted] filed an amended Form 1120-FSC for its TYE [redacted] reflecting an increased profit resulting from a transaction-by-transaction regrouping of sales. The additional profit reflected on the amended Form 1120-FSC would give rise to an additional commission expense on [redacted]'s [redacted] Form 1120 of $[redacted]. [redacted] did not file a formal or informal claim for refund based on the claimed additional commission expenses prior to the expiration of the general 3-year refund statute of limitations for [redacted]'s TYE [redacted].

The taxpayer takes the position that the Form 872 executed with respect to [redacted]'s TYE [redacted] encompass [redacted]'s TYE [redacted] because [redacted] is an affiliated company of [redacted].

DISCUSSION

As in effect for the year in issue, the regulations under section 925 permitted a FSC and its related supplier to redetermine the commission earned by the FSC even after the filing of their original returns, provided certain conditions were met. Treas. Reg. 1.925(a)-1T(e)(4) provided:

> The FSC and its related supplier would ordinarily determine under section 925 and this section the transfer price or rental payment payable by the FSC or the commission payable to the FSC for a transaction before the FSC files its return for the taxable year of the transaction. ... In addition, a redetermination may be made by the FSC and related supplier if their taxable years are still open under the statute of limitations for making claims for refund under section 6511 if they determine that a different transfer pricing method may be more beneficial. Also, the FSC and related supplier may redetermine the amount of foreign trading gross receipts and the amount of costs and expenses that are used to determine the FSC's and related supplier's profits under the transfer pricing methods. Any redetermination shall affect both the FSC and the related supplier.

In Union Carbide Corp. v. Commissioner, 110 T.C. 375 (1998), the Tax Court addressed the issue of whether a related supplier could claim additional commission expenses based on a redetermination of the FSC's commissions where the supplier's statute of limitation for refund was open but the FSC's statute for refund was not. The taxpayer argued that Treas. Reg. 1.925(a)-1T(e)(4) allowed a redetermination so long as refund statute of the entity seeking the refund was open or, alternatively, that if the regulation required both the FSC's and the supplier's refund statutes to be open, that the regulation was invalid. The Tax Court rejected the taxpayer's arguments, holding that (1) Treas.

Reg. 1.925(a)-1T(e)(4) allows a FSC and its related supplier to redetermine commissions only if the redetermination is made within the refund statute of both the FSC and the related supplier, and (2) that Treas. Reg. 1.925(a)-1T(e)(4) is valid. Union Carbide Corp. v. Commissioner, 110 T.C. 375 (1998).

In the present case, the refund statute for [redacted]'s TYE [redacted] has been kept open by virtue of a statute extension. [redacted]'s general refund statute for the TYE [redacted], however, expired on or about [redacted], without the filing of a protective claim or the execution of a Form 872 for that entity. Under Treas. Reg. 1.925(a)-1T(e)(4) and Union Carbide, no redetermination of [redacted]'s commission expense for the TYE [redacted] is permissible if [redacted]'s refund statute for that year has expired.

The taxpayer argues forcefully that the Form 872 extended the statute of limitations for [redacted] as well as the [redacted] consolidated group. Specifically, the taxpayer argues that the term "[redacted]" used in the Form 872 encompasses [redacted]. However, while [redacted] is a wholly-owned subsidiary of [redacted], as a foreign corporation[1] it was not, and could not be, part of the [redacted] "affiliated group." I.R.C. § 1504(a)(1)&(b)(3). Further, while [redacted] may have been an officer of [redacted], nothing on the Form 872 suggests that he executed the form in that capacity. Accordingly, we believe that the better view is that the Form 872 does not encompass [redacted] and that [redacted]'s refund statute for [redacted] has expired.

The taxpayer apparently further argues that it intended the Form 872 to apply to [redacted]'s TYE [redacted]. Whether the taxpayer intended or believed that the Form 872 applied to [redacted]'s TYE [redacted] is an open question of fact which, in our view, is not controlling. Waivers of the statute of limitations on assessment are to be interpreted by looking to the "objective manifestations of mutual assent" as reflected in the written agreement. Schulman v. Commissioner, 93 T.C. 623, 639 (1998). A taxpayer's subjective intent is not relevant in interpreting the terms of a Form 872. Kronish v. Commissioner, 90 T.C. 684, 693-694 (1998). If in fact the taxpayer believed that the Forms 872 encompassed [redacted]'s TYE [redacted], such a belief would, at best, constitute a unilateral mistake of fact which would not change the terms of the Forms 872.

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[1] I.R.C. § 7701(a)(5) defines a "foreign" corporation as "a corporation ... which is not domestic." I.R.C. § 7701(a)(4), in turn, defines a "domestic" corporation as "a corporation ... created or organized in the United States or under the law of the United States or of any State." Compare, I.R.C. § 881(b)(1) (providing that, under certain circumstances, for purposes of sections 881 and 884, corporations created or organized in the Virgin Islands will not be treated as foreign corporations).

If you have any questions respecting this matter, please call Jack Forsberg at 290-3473, ext. 227.

REID M. HUEY
District Counsel

By: Jack Forsberg
JACK FORSBERG
Special Litigation Assistant

cc: Assistant Chief Counsel
(Field Service)